Nos. 85-1377, 85-1378, 85-1379

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT COMPTROLLER GENERAL OF THE UNITED STATES

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QUESTION PRESENTED

Whether it is unconstitutional for the Comptroller General, an independent officer of the United States appointed for a statutory term of years by the President by and with the advice and consent of the Senate, to perform administrative functions of a factfinding nature assigned to him by a 1985 law, merely because the 1921 law creating his office contains a provision for his removal for cause after hearing by enactment of a joint resolution presented to the President for approval or veto, when neither the President nor Congress has ever attempted to remove a Comptroller General for cause or otherwise and there has been no determination of their respective constitutional powers to do so.[1]

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[1] This appeal is from two cases that were consolidated in the court below. The parties in Civil Action No. 85-3945 were Representatives Mike Synar, Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Traficant, Jr. as plaintiffs; the United States as defendant; and the Comptroller General of the United States, the United States Senate, and the Speaker and Bipartisan Leadership Group of the United States House of Representatives (Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott) as intervening defendants. The parties in Civil Action No. 85-4106 were the National Treasury Employees Union as plaintiff and the same defendant and intervening defendants as No. 85-3945.

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BRIEF FOR APPELLANT COMPTROLLER GENERAL OF THE UNITED STATES

OPINION BELOW

The opinion and order of the district court, which are not yet reported, are reproduced in the Joint Appendix ("J.A.") at 27, 81.

JURISDICTION

This appeal arises from two suits brought under section 274(a) of the Balanced Budget and Emergency Deficit Control Act of 1985 [2] for a declaratory judgment that portions of that statute are unconstitutional. The cases were consolidated and heard by a three-judge court, which entered its judgment in both cases on February 7, 1986 (J.A. 81). Appellant Comptroller General of the United States filed his notice of appeal in the district court that day (J.S. App. 1a-2a). The appeal was docketed on February 18, 1986, and this Court noted probable jurisdiction on February 24, 1986. This Court has jurisdiction under section 274(b) of the challenged statute (J.A. 163) and under 28 U.S.C. § 1252 (1982).

STATUTES AND CONSTITUTIONAL PROVISIONS

The challenged statute is set forth at J.A. 103. The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921), which established the office of the Comptroller General and prescribed the manner of his appointment and removal, is set forth at J.A. 92. Section 703 of Title 31, U.S. Code, which currently codifies the provisions relating to the appointment and removal of the Comptroller General, is set forth at J.A. 101. Article II, section 2, clause 2 of the Constitution, dealing with the appointment of officers of the United States, is set forth at J.A. 92.

STATEMENT

This case involves the constitutionality of the Balanced Budget and Emergency Deficit Control Act (the "Act" or

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[2] Pub. L. No. 99-177, 99 Stat. 1037, J.A. 103.

"1985 Act"),[3] a statute creating a new governmental mechanism designed to reverse the spiral of growing federal budget deficits the United States has experienced in recent years—deficits that have been rising at a rate threatening the Nation's economy, increasing more than sevenfold since 1979.[4]

Despite a widespread consensus that the deficits must be reduced, both Houses of Congress and the President have been unable to enact a formula of budget cuts and/or revenue increases that would achieve the needed reduction. To resolve this dilemma, the Act creates a mechanism that will automatically produce across-the-board reductions in specified categories of government spending, unless Congress enacts laws that achieve the deficit targets fixed in the Act by other means. The legislative history shows that the major purpose of this automatic feature is to induce the political compromises necessary to enact such laws. Over the six-year period from fiscal 1986 through fiscal 1991, the deficit targets shrink successively from $172 billion to zero.

The Comptroller General's Responsibilities Under the Act

The keystone of the Act is a delegation of administrative functions of a factfinding nature to the Comptroller General. The deficit reduction mechanism requires the Comptroller General, in a report delivered to the President and Congress, (1) to forecast the amount, if any, by which the deficit will exceed the statutory target for the coming fiscal year, and (2) to determine what, if any, reduction the Act requires to be made in each non-exempt category of federal spending in order to achieve the target.

The first of those determinations—the deficit forecast—requires the Comptroller General to project federal

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[3] Pub. L. No. 99-177, 99 Stat. 1037, J.A. 103.

[4] *See, e.g., Balanced Budget and Emergency Deficit Control Act of 1985: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 164 (1985).

budget outlays and receipts for the year on the basis of detailed assumptions set forth in the Act.[5] If the projected deficit exceeds the target deficit in the Act for that year by $10 billion or more ($0 in fiscal years 1986 and 1991), the Comptroller General must then make the second determination—the calculation of the amounts and percentages by which spending must be reduced in each federal spending account to eliminate the "deficit excess."[6] The Act prescribes detailed rules for making that calculation. The necessary reduction is first split evenly between defense and nondefense programs, with certain nondefense programs exempted;[7] then it is allocated among specific accounts.[8]

If the Comptroller General's report finds that reductions are required by the Act, the report "triggers" a statutory directive that the President issue a sequestration order reducing automatic spending increases and sequestering funds.[9] The Act requires the President to base his order on the Comptroller General's report.[10] The President's order becomes effective after thirty days, unless Congress meanwhile enacts a joint resolution (signed by the President or passed over his veto) meeting the Act's deficit target in some different way.[11] The Comp-

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[5] *See* Act §§ 251(a)(1), (2), (6), 251(b), J.A. 109, 109, 115, 116.

[6] *See* Act §§ 251(a)(2), 251(b), J.A. 109, 116. The Act establishes a maximum deficit reduction of $11.7 billion for fiscal 1986. Act § 251(a)(3), J.A. 110.

[7] Act § 251(a)(3)(B), J.A. 110.

[8] Act § 251(a)(3)(C), (D), (E), (F), J.A. 111-12.

[9] Act § 252(a)(1), J.A. 124; Conference Report, H.R. Rep. No. 433, 99th Cong., 1st Sess. 76 ("Conf. Report"), *reprinted in* 1985 U.S. Code Cong. & Ad. News 988, 994.

[10] Act §§ 252(a)(1), (3), 252(b)(1), J.A. 124, 128, 132; Conf. Report at 74, 76, 78. The President has limited discretion to allocate funds for defense spending in fiscal year 1986. Act § 252(a)(2), J.A. 125.

[11] Act §§ 252(a)(1), 254(b), J.A. 124, 139. In fiscal years after 1986, the reporting procedure will be followed a second time later in the fiscal year, to account for changes in laws and regulations since the first report cycle. Act § 251(c), J.A. 118.

troller General must submit a report to Congress and the President each year detailing the compliance of the President's sequestration order with the requirements of the Act.[12]

The role assigned to the Comptroller General in this process was a compromise between the Senate and the House. The original Senate-passed version of the Act assigned the forecasting and reporting function jointly to the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO").[13] The House was unwilling to give that role to the Director of OMB, who is under the direct control of the President. Instead, the House-approved version delegated the function solely to the Director of CBO, who is under the direct control of Congress, and who was to act "in consultation with" the Director of OMB.[14] Questions about the constitutionality of that arrangement led the Senate to propose what became the final solution: The function was assigned to the Comptroller General, who would receive and consider a joint report from the Directors of OMB and CBO and then make his report to the President and Congress based on his own "independent analyis." [15]

The Comptroller General's "independent analysis" is to begin before he receives the Directors' report and is to include monitoring "all relevant data on an on-going basis." [16] He must give "due regard" to the Directors'

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[12] Act § 253, J.A. 134.

[13] 131 Cong. Rec. S13,093, S13,096 (daily ed. Oct. 10, 1985); *see id.* at S13,113-14 (Senate passage).

[14] 131 Cong. Rec. H9582, H9590 (daily ed. Nov. 1, 1985); *see id.* at H9614-15 (House approval); Conf. Report at 72.

[15] Act § 251(a), (b), J.A. 109, 116; Conf. Report at 84; *see id.* at 73-74. If the Directors fail to agree on any items, they must report the average of their differing figures as well as the figures each Director separately proposes for the items in question. Act § 251(a)(5), J.A. 115.

[16] Conf. Report at 84.

report and must "explain fully any differences between the contents of [his] report and the report of the Directors." [17] But his report, and not theirs, is the one on which the statute requires the President to act.[18]

The Act contains a fallback mechanism, which comes into play only if the Act's triggering mechanism is held invalid. Under the fallback, the Directors' report is submitted to Congress itself, which would then decide whether to enact a joint resolution meeting the deficit target in the Act.[19] Since this fallback depends on the passage of another law, it is essentially a return to the *status quo ante*.

The President signed the bill, noting in his approval message that he supported the bill's automatic reduction mechanism but that he doubted the constitutionality of assigning the reporting function to the Comptroller General. He expressed the view that "executive functions may only be performed by officers in the executive branch" and that the Comptroller General is an "agent[] of Congress, not [an] officer[] in the executive branch." [20]

The statutory process is well under way for fiscal 1986. The Comptroller General received the joint report of the Directors on January 15, 1986. His report, issued on January 21, 1986, found that the Act requires sequestrations in the amount of $11.7 billion this year.[21] The President issued his sequestration order on February 1,

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[17] Act § 251(b)(1), (2), J.A. 116, 117; Conf. Report at 74.

[18] Act § 252(a)(1), (3), 252(b)(1), J.A. 124, 128, 132; Conf. Report at 74, 76, 78.

[19] Act § 274(f), J.A. 165.

[20] Statement on Signing H.J. Res. 372 into Law, 21 Weekly Comp. Pres. Doc. 1490-91 (Dec. 12, 1985), *quoted in* Opinion at 33 n.22, J.A. 61.

[21] United States General Accounting Office, Budget Reductions for FY 1986, Report to the President and the Congress, 51 Fed. Reg. 2811, 2813 (1986).

1986. It became effective by the terms of the Act on March 1, 1986.[22]

The Proceedings Below

Plaintiffs invoked the judicial review provision in the Act by filing suits against the United States to challenge the Act's constitutionality. The Comptroller General, the Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives intervened as defendants. Motions to dismiss and for summary judgment were filed and argued. The United States, although a defendant in the actions, moved for summary judgment that the Act is unconstitutional on some of the grounds asserted by the plaintiffs, including the ground adopted by the district court.

The district court issued its opinion and judgment on February 7, 1986. It declared the Act unconstitutional insofar as it delegates what the court called "executive powers" to the Comptroller General, but rejected or found no need to consider all other constitutional challenges to the Act.

The district court based its ruling of unconstitutionality on its view that "executive powers" may not be conferred on the Comptroller General because he is an officer "removable by Congress." [23] The court assumed, without deciding, that the Comptroller General, who is appointed by the President by and with the advice and consent of the Senate, is an "officer of the United States" within the meaning of the Appointments Clause of the Constitution.[24] However, it regarded the Comptroller General as "removable by Congress" because a provision of the Budget and Accounting Act of 1921 ("1921

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[22] Emergency Deficit Control Measures for Fiscal Year 1986, 51 Fed. Reg. 4291 (Feb. 4, 1986); Act § 252(a)(6)(A), J.A. 129.

[23] Order at 2, J.A. 82.

[24] U.S. Const. art. II, § 2, cl. 2, J.A. 92; *see* Opinion at 34-35 & n.23, J.A. 61.

Act"),[25] which established his office with a 15-year nonrenewable term, states that he may be removed by impeachment or, after hearing, for cause by joint resolution of Congress.[26] Although a joint resolution, like a bill, must be presented to the President for his signature or veto,[27] the court treated the Comptroller General as removable unilaterally by Congress because of the possibility that a veto might be overridden by a two-thirds vote of both Houses.[28]

The district court ruled that this removal provision gives the Comptroller General a "presumed desire to avoid removal by pleasing Congress," creating a "here-and-now subservience to another branch" that is impermissible in an officer performing administrative duties.[29] In so ruling, the court rejected the Comptroller General's argument that removability *for cause* does not make an officer of the United States subservient to the removing authority.

The district court also rejected the Comptroller General's contention that any constitutional infirmity in the 1921 removal provision should be cured by striking that provision from the 1921 Act, not by invalidating the administrative duties conferred on the Comptroller General by the same 1921 Act and by subsequent laws including the 1985 Act. The court refused to consider whether the removal provision created an issue of constitutional incompatibility within the 1921 Act itself or,

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[25] Ch. 18, 42 Stat. 20 (1921) (codified at 31 U.S.C. §§ 701, *et seq.* (1982)), J.A. 92.

[26] *See* 31 U.S.C. § 703(e) (1982), J.A. 102. The 1921 Act included the phrase "and for no other cause and in no other manner." 1921 Act § 303, 42 Stat. at 24, J.A. 94. The Code revision enacted in 1982 deleted that phrase as "surplus." 31 U.S.C. § 703 (1982), note at 353.

[27] U.S. Const. art. I, § 7, cl. 3.

[28] Opinion at 31 & n.21, J.A. 58.

[29] *Id.* at 30, J.A. 57.

if so, whether that provision should be severed. The court limited its inquiry to the 1985 statute, and presumed that Congress in 1985 would not have chosen the Comptroller General for the reporting function but for the "subservience" produced by the 1921 removal provision. It cited no legislative history of either Act to support that presumption. Nor did the court consider whether a removal provision reserving a role for Congress is unconstitutional *per se* for *any* officer of the United States, whatever functions he performs, and hence severable from the balance of the 1921 Act.[30]

This appeal followed. As the Act requires, the district court stayed its judgment pending the appeal.[31]

SUMMARY OF ARGUMENT

I. The district court held that the removal provision of the 1921 Act creates a subservience of the Comptroller General to Congress and is therefore incompatible with the 1985 Act's delegation of administrative functions to the Comptroller General. It concluded that the 1985 delegation is therefore unconstitutional. In reaching this result, the district court did not consider the legislative history of the 1921 Act or the validity of the removal provision in the context of the 1921 Act.

The district court erred in failing to examine the removal provision as part of the 1921 Act. That is the logical place to begin in determining the effect of the provision on the constitutionality of the 1985 Act. If the removal provision did not make the Comptroller General subservient to Congress in performing his administrative functions under the 1921 Act, it could have no such effect on his 1985 Act functions. If the removal

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[30] *Id.* at 32-34, J.A. 59-61. In other portions of its opinion, the district court rejected the argument of the United States that the congressional plaintiffs lack standing and plaintiffs' argument that the Act impermissibly delegates legislative power. *Id.* at 12, 27-28, J.A. 37, 54-55.

[31] Order at 2, J.A. 82; *see* Act § 274(e), J.A. 165.

provision is unconstitutional and not a valid part of the 1921 Act, it can have no bearing on the further delegation made by the 1985 Act.

The district court said it was unaware of any case in which a court had "even considered choosing" which of two constitutionally incompatible statutes to invalidate. Rather, it said, courts always "set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." [32] But in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), this Court did just what the district court declined to do here. In *Glidden*, this Court was asked to strike down a statute authorizing the temporary assignment to Article III courts of judges of certain other courts. Plaintiffs claimed those other courts were not Article III courts because of earlier statutes relating to their jurisdiction that had been construed as being incompatible with Article III status. The Court did not strike down the assignment statute that "allegedly authorize[d] [the plaintiff's] injury in fact." Instead, it ruled that the earlier statutes would have to fall, because Congress had intended to establish those courts as Article III courts from their inception. When the court below perceived a constitutional problem, it should have followed the same principle.

II. Had the district court examined the history and constitutionality of the 1921 Act, it would have found that the purpose of that Act was to make the new General Accounting Office ("GAO") independent of both political branches. The Act made the Comptroller General, as GAO's head, an independent officer of the United States duly appointed for a 15-year nonrenewable term by the President by and with the advice and consent of the Senate. As an independent officer, the Comptroller General was delegated functions performed since 1789 by the Comptroller of the Treasury—functions that were clearly administrative as well as judicial in nature.

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[32] Opinion at 32, J.A. 59.

Those functions included settling the Government's accounts, in a manner binding on the executive departments, and suing to collect the Government's claims.

The main purpose of the removal provision was to make the Comptroller General an independent auditor or watchdog, in contrast to his predecessor in the Treasury Department, whom Congress regarded as subservient to the President because the President could remove him at will. Congress chose to authorize removal only by joint resolution for cause as a way to protect the Comptroller General's independence from the President, not to make him subservient to Congress. Indeed, several members expressed the view that the procedural obstacles to removal for cause by joint resolution were so great that as a practical matter a Comptroller General once appointed would remain in office throughout his term.

In any event, the legislative history of the 1921 Act makes clear the intent of Congress that if the removal provision were held invalid it should be severed to preserve the balance of the 1921 Act. In that event, it could have no effect on the constitutionality of the 1985 delegation of functions to the Comptroller General.

III. In the light of this history and *Glidden*, we submit there are only three logical methods of adjudicating the effect of the 1921 removal provision on the constitutionality of the 1985 Act. We submit also that under any of the three, the 1985 Act's delegation of the reporting function to the Comptroller General is constitutional.

1. *First, the Court could conclude that there is no constitutional incompatibility between the 1921 removal provision and the 1921 and 1985 delegations, because the power to remove an officer of the United States for cause after hearing does not create a "subservience" of that officer to the removing authority.*

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), this Court found that Congress had created the Federal Trade Commission to be independent of the President, even though the statute authorized him to re-

move Commissioners for cause. Since the President's retained power to remove for cause created no subservience to the President as the removing authority, it should follow that the reserved power of Congress to remove the Comptroller General solely for cause by enacting a joint resolution creates no subservience to Congress. The district court nonetheless "presumed" subservience, relying on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). It analogized the removal clause of the 1921 Act to the 14-year term of the bankruptcy judge, which created a possibility of nonrenewal and was incompatible with Article III status. It said that just as the possibility of nonrenewal created a subservience of the bankruptcy judge to the President, the possibility of removal for cause creates "here-and-now subservience" of the Comptroller General to Congress. But to suggest that a tenure or removal provision impermissible for an Article III judge creates subservience that is impermissible for other officers of the United States disregards the special constitutional status of Article III judges. The district court's reasoning would invalidate *all* statutory fixed terms for the numerous independent officers of the United States performing administrative duties, because those fixed terms would create "subservience" to the Senate as well as to the President with whom the Senate shares the reappointment power. Under the district court's theory of subservience to another branch, the longstanding practice of giving independent officers fixed, renewable terms would itself have to be struck down.

The district court's presumption that the removal provision makes the Comptroller General "subservient to another branch" is also unjustified in fact. It disregards almost a century of history, since the creation of the first independent agency, in which neither the President nor Congress has exercised the power to remove an independent officer for statutorily prescribed cause. And it ignores the fact that the Comptroller General has consistently demonstrated his independence of Congress as well as of the President.

The district court further presumed that the 1985 Congress would not have delegated the reporting function to the Comptroller General but for the "subservience" produced by the removal provision. But the 1985 legislative history does not substantiate that presumption. Indeed, our research discloses no reference whatever in that history to the never-invoked removal provision of the 1921 Act. Rather, Congress in 1985 chose the Comptroller General because of his independence and his constitutional capacity, as an officer of the United States, to perform administrative functions that CBO could not. The Senate floor leaders even referred to GAO, which the Comptroller General heads, as an "executive" agency, in contrast to an agency (like CBO) under the control of Congress.

2. *Second, if this Court should agree with the ruling below that administrative functions cannot be delegated to an officer of the United States "removable by Congress," it could sever the removal provision from the 1921 Act.*

The 1920 and 1921 Congresses were aware of the constitutional problem posed by the removal provision, because in 1920 President Wilson had vetoed a version of the same bill providing for removal by concurrent rather than joint resolution. In his veto message, President Wilson asserted that the President has the sole power to remove any presidential appointee, and that Congress cannot share in the removal power. As the legislative history of the 1920 and 1921 bills shows, Congress intended the Comptroller General's statutory functions to survive even if the removal provision should be ruled invalid. Once severed, the removal provision could have no bearing on the constitutionality of the 1985 Act.

The district court suggested, without deciding, that even apart from the removal provision, the functions delegated to the Comptroller General by the 1985 Act are too "executive" to be performed by an officer independent of the President. That suggestion cannot be squared with *Humphrey's Executor* and subsequent decisions uphold-

ing delegations to independent officers of functions involving broader policy judgments than the merely factfinding judgments involved here. It also disregards the district court's own findings that the functions delegated by the 1985 Act are of a factfinding nature and do not call for "a single *policy* judgment."

There may be "executive powers" that can be assigned only to officers removable at the pleasure of the President, such as the conduct of foreign policy that was the focus of the congressional decision of 1789. But the factfinding functions assigned to the Comptroller General by the 1985 Act are not among them.

3. *Third, this Court could decide that, apart from the issue of subservience to another branch, the removal provision of the 1921 Act is unconstitutional on its face for the reason stated by President Wilson, and could then sever the provision from the 1921 Act.*

This was the view adopted by the majority in *Myers v. United States*, 272 U.S. 52 (1926), six years after President Wilson's veto message. When this Court later limited the *Myers* ruling to "purely executive officers," [33] it upheld a statute that authorized the President to remove Federal Trade Commissioners for cause, not a statute that involved Congress in the removal process. This Court has not considered such a statute since its ruling in *Myers*. If this Court should decide now that the President may insist on the sole power to dismiss for cause his appointee to an independent office, it should strike the 1921 removal provision as invalid on its face and sever it from the remainder of the 1921 Act. In that event, of course, the removal provision would have no bearing on the constitutionality of the 1985 Act.

IV. Any of these three methods of disposition would sustain the constitutionality of the Comptroller General's functions under the 1985 Act. In our submission, the narrowest and most appropriate is the first. If this Court agrees that the 1921 removal provision did not then and

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[33] *Humphrey's Executor*, 295 U.S. at 627-28.

does not now create an impermissible subservience, there is no need to decide whether the President may insist on an exclusive constitutional power to remove the Comptroller General for cause. That issue can be left for the day, which may never come, when either the President or Congress attempts such a removal.

In any event, we urge the Court to adopt one of the three suggested methods of disposition and reverse the ruling below. Otherwise, a grave and unnecessary restraint would be placed on the capacity of our constitutional system to adopt innovative solutions to the increasingly complex problems that modern democratic governments must address. The concept of the independent officer of the United States appointed for a fixed term is an example of such an innovation. While there is room for debate whether a century of experience has confirmed the utility of all the independent offices Congress has created, it is important that our system has been flexible enough to allow this experiment, and that the courts did not condemn it at birth as an unconstitutional inroad on the separation of powers.

These principles apply to the 1985 Act. The linchpin of this innovative legislation is its delegation of the reporting function to an independent officer subservient to neither the President nor Congress. It may or may not succeed in reversing the governmental cancer of budget deficits that has been growing for two decades and may soon become inoperable. An overly rigid theory of separation of powers should not be invoked to abort this potentially important idea before we can see how it works in practice. Thirty-two states have already issued calls for a constitutional convention to adopt an amendment mandating a balanced budget. If the Constitution we have is ruled too inflexible to accommodate the experiment of the 1985 Act, which can be promptly modified or repealed by another statute if it proves to be a bad idea, the result may be to add momentum to a convention and to unwise constitutional amendments that would take much longer to reverse.

ARGUMENT

I. BEFORE DECIDING THE EFFECT OF THE 1921 ACT'S REMOVAL PROVISION ON THE CONSTITUTIONALITY OF THE TRIGGER MECHANISM IN THE 1985 ACT, THE DISTRICT COURT SHOULD HAVE CONSIDERED THE LEGISLATIVE HISTORY OF THE 1921 ACT AND THE VALIDITY OF THE REMOVAL PROVISION IN THE CONTEXT OF THAT ACT.

The district court made a fundamental error in refusing to consider the constitutionality and severability of the 1921 removal provision in the context of the 1921 Act. The court ruled that the removal provision is incompatible with the 1985 delegation of administrative or "executive" functions to the Comptroller General.[34] But it failed to consider the validity of the removal provision within the 1921 Act itself. Since the 1921 Act also delegated administrative functions to the Comptroller General, the same potential for incompatibility existed within the 1921 Act. If the removal provision did not make the Comptroller General subservient to Congress in performing

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[34] The district court used the term "executive powers," an expression that introduces some ambiguity into its opinion. This Court in *Buckley v. Valeo*, 424 U.S. 1, 141 (1976), used the terms "administrative functions" and "administration and enforcement of public law" to refer generally to the class of functions that may be performed only by an "Officer of the United States" appointed under the Appointments Clause. This Court described such functions generically as "the performance of a significant governmental duty exercised pursuant to a public law." 424 U.S. at 141; *see id.* at 126. We use the term "administrative functions" in that sense.

To avoid ambiguity, we reserve the term "executive" for powers that must be exercised by what this Court has termed "purely executive officers"—officers in the executive departments, who are under the direction of the President and subject to removal at his pleasure. *See Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935). Some functions may be so inherently "executive" that the Constitution would not allow them to be delegated to an independent officer. However, this Court's decisions make plain that none of the functions assigned to the Comptroller General by the statutes at bar is in that category. *See infra* pp. 42-47.

his 1921 Act functions, it could have no such effect on his 1985 Act functions. And if it is invalid as part of the 1921 Act, it could have no effect on the 1985 Act.

The district court refused to consider these questions. It said it was unaware of

> "any case in which a court confronted with separate statutes, constitutionally incompatible in combination, has even considered choosing which of the two to invalidate . . . . To the contrary, as the cases specifically involving incompatible authorization and tenure (or appointment) statutes amply demonstrate, the courts set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." [35]

However, in *Glidden Co. v. Zdanok*,[36] an important "authorization" case, this Court did just the opposite. In *Glidden*, the Court was asked to strike down the assignment of a Court of Claims judge and a Court of Customs and Patent Appeals judge to sit temporarily on Article III courts under a 1958 statute that expressly authorized such assignments. The ground for challenging the assignment statute was that this Court had expressly ruled in two prior cases (*Bakelite* [37] and *Williams* [38]) that those two courts did not meet the constitutional standards for an Article III court. But this Court did not, as the district court's approach would require, strike down the assignment statute that "allegedly authorize[d] the plaintiff's injury in fact." Instead, it upheld that statute because it found that, contrary to its earlier decisions, Congress had intended the two courts to be Article III courts from their inception.

To reach that result, the Court in *Glidden* had to deal with earlier statutes that had been construed as inconsistent with Article III status for those courts. In *Wil-*

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[35] Opinion at 32, J.A. 59.

[36] 370 U.S. 530 (1962) (plurality opinion).

[37] *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

[38] *Williams v. United States*, 289 U.S. 553 (1933).

liams, it had construed a 1932 statute as authorizing salary cuts for the judges of those courts;[39] and in *Bakelite* it had interpreted the jurisdictional statutes of those courts as including advisory opinion functions that were inconsistent with Article III status.[40] The plurality opinion in *Glidden* declared expressly that "if necessary, the particular offensive [advisory opinion] jurisdiction" contained in the jurisdictional statutes, rather than the Article III status of the two courts, "would fall."[41] Moreover, since the "particular offensive jurisdiction" of the Court of Claims was part and parcel of the basic jurisdictional statute of that court, the *Glidden* plurality necessarily found it severable from the remainder.[42]

In making those rulings, the Court resolved an incompatibility between provisions of separate statutes by considering how best to achieve the congressional intent. The course it chose was to declare invalid and sever provisions of statutes other than the one that "allegedly authorize[d] the plaintiff's injury in fact."[43]

The cases cited by the lower court neither dictate nor justify its contrary course.[44] Nor did the court point to any logical connection between the basis asserted for

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[39] *See* 289 U.S. at 560, 571, 581.

[40] 279 U.S. at 454, 460.

[41] 370 U.S. at 583.

[42] *See* Judicial Code of 1911, Pub. L. No. 61-475, 36 Stat. 1135, 1138. Justice Clark, in a concurring opinion in which Chief Justice Warren joined, stated that the two courts should advise Congress that they could no longer render advisory opinions. 370 U.S. at 587, 589. Thus, a majority of the Court ruled that the advisory jurisdiction would have to fall.

[43] *See also Bakelite*, 279 U.S. at 460.

[44] *See* Opinion at 32, J.A. 59, citing *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928); *Myers v. United States*, 272 U.S. 52 (1926); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). In each of those cases, the asserted incompatibility existed within a single statute, not between the statute that the plaintiff(s) attacked and some other statute.

standing and the appropriate relief. Where, as here, it is the combination of two statutes that is asserted to be unconstitutional, the choice of which to invalidate should not depend on which is first challenged. Particularly where a subsequent statute gives new functions to an officer created by an earlier one, the new statute should be read *in pari materia* with the organic statute defining the office, as this Court did in *Glidden*. If it had followed the approach taken in *Glidden*, the district court would have examined the validity of the removal provision as part of the 1921 Act. If it had then found any incompatibility between provisions of that Act, it should have considered what method of eliminating that incompatibility would best achieve the objectives of the 1921 and 1985 Congresses. That method, as we show below, would be to strike the removal clause.

II. THE 1921 ACT ESTABLISHED THE COMPTROLLER GENERAL AS AN INDEPENDENT OFFICER OF THE UNITED STATES CAPABLE OF PERFORMING ADMINISTRATIVE FUNCTIONS; ITS REMOVAL PROVISION HAS NEITHER THE PURPOSE NOR THE EFFECT OF MAKING THAT OFFICER SUBSERVIENT TO CONGRESS.

The court below sought to minimize the impact of its ruling by "posit[ing]" for purposes of its decision that all of the Comptroller General's functions under the 1921 Act involve only "legislative . . . aid." [45] But that proposition cannot survive scrutiny of the 1921 statute or of its legislative history. The 1921 Act gave the Comptroller General important administrative functions that present the same issue of incompatibility raised by the court below. If the district court had considered that issue in the context of the 1921 Act, we submit that it would have found no incompatibility, because the removal provision was not intended to make the Comptroller General subservient to Congress and has not done so.

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[45] Opinion at 43, J.A. 71 (quoting *Humphrey's Executor*, 295 U.S. at 628).

A. The 1921 Act Transferred to the Comptroller General Administrative and Other Functions that Had Been Performed by Officers in the Treasury Department Since 1789.

The 1789 statute creating the Treasury Department established within it a Comptroller of the Treasury, who was responsible for ensuring that federal moneys were properly spent, received, and accounted for. His functions plainly involved the administration of the laws. They included: (1) settling all accounts of the federal government and supervising the recovery of debts owed to it; (2) certifying balances that were conclusive on the executive departments; (3) suing for all delinquencies of revenue officers and for all debts owed to the federal government; (4) making advance determinations on questions of payment when requested by disbursing officers and department heads; and (5) prescribing the forms of keeping and rendering public accounts of the federal government. The 1789 statute and its successors detailing these functions are summarized in Appendix A to this Brief.

In 1921, these mixed administrative and judicial functions—developed over some 130 years and performed by officers in an executive department—were transferred to a new and independent General Accounting Office ("GAO") headed by the Comptroller General.[46] This was one of two major reforms instituted by the 1921 Act.[47] The other was to require the Executive Branch for the first time to prepare unified annual budgets for the federal government—a task given to a new Bureau of the Budget under the direction of the President.

At the same time that Congress brought the Executive Branch into the budget process, it decided to insulate from

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[46] Ch. 18, 42 Stat. 20 (1921). The 1921 Act abolished the office of Comptroller of the Treasury and the officers under him and vested in GAO "[a]ll powers and duties . . . [previously] conferred or imposed by law" on them. 1921 Act §§ 301, 304, 310, 42 Stat. at 24-25, J.A. 93, 94, 97.

[47] 61 Cong. Rec. 975 (1921) (remarks of Rep. Snell).

presidential direction the job of ensuring that federal officials properly expend public funds. It expressly declared that the new GAO "shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States." [48] Section 304 of the 1921 Act stressed that the Comptroller General's duties were to be "exercised without direction from any other officer." [49]

B. The Main Purpose of Creating the Comptroller General Was to Place These Functions in an Officer Independent of Both the President and Congress.

The decision to create an independent Comptroller General was based on unhappy experience with the prior system in which the Comptroller was under presidential control. That experience was summed up by Representative Good, the Chairman of the House Select Committee on the Budget and the floor manager of the bills that became the 1921 Act:

> "I think it was under the administration of President Cleveland that the President desired to use a certain appropriation for a given purpose, and was told by his Comptroller of the Treasury, who happened to be a little independent of this system, that he could not do it. But the President insisted and finally said, 'I must have that fund, and if I can not change the opinion of my comptroller, I can change my comptroller.' With less independence all comptrollers, no matter to which political party they owe allegiance, have been forced to face the same practical situation." [50]

The Committee intended "that the Comptroller General should be something more than a bookkeeper or accountant; that he should be a real critic." [51] To ensure that

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[48] 1921 Act § 301, 42 Stat. at 23 (codified at 31 U.S.C. § 702 (1980)).

[49] *Id.* § 304, 42 Stat. at 24.

[50] 61 Cong. Rec. 982 (1921).

[51] *Id.* at 1090.

result, the Comptroller General was given a term of 15 years, during which he is not removable by the President alone but only by impeachment or, for cause, by joint resolution.[52] He may not be reappointed, thus removing any temptation to curry reappointment.[53] The 1921 Act thus reflected the same concern expressed by James Madison about the Comptroller's function when the Treasury Department was created in 1789:

> "It will be necessary . . . to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not purely of an executive nature. It seems to me that they partake of a judiciary quality as well as executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government." [54]

It is noteworthy that Madison expressed this view only a week after he had convinced the House that the President should have an unfettered power to remove the Secretary of State at pleasure.[55]

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[52] 1921 Act § 303, 42 Stat. at 24 (codified at 31 U.S.C. § 703(b) (1982)), J.A. 101.

[53] 1921 Act § 303, 42 Stat. at 24 (codified at 31 U.S.C. § 703(b) (1982)), J.A. 101.

[54] 1 Annals of Cong. 635-36 (1789) (J. Gales ed. 1834). Madison proposed that the Comptroller of the Treasury be given a limited term of years, to ensure his independence by balancing the President's power to remove him against the Senate's power to refuse to confirm his reappointment. *Id.* Congress did not adopt the proposal.

[55] 1 Annals of Cong. 380, 461-64, 495-97, 578-82 (J. Gales ed. 1789, *relied on in Myers*, 272 U.S. at 109-36, *discussed infra* pp. 47-48.

Over the years, Congress has given the Comptroller General additional administrative or judicial functions for which his in-

C. The 1921 Removal Provision Has Neither the Purpose Nor the Effect of Making the Comptroller General Subservient to Congress.

The lower court found that the 1921 removal provision gives the Comptroller General a "presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." [56] The district court "presumed" that the "purpose" and effect of the removal provision was to cause "the Comptroller General to look to the legislative branch rather than the President for guidance." [57] As to the purpose of the provision, the district court's presumption is refuted by the legislative history of the 1921 Act. As to the legal and factual effect of the provision, the ruling is inconsistent with this Court's decisions and with the experience of nearly a century

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dependence and expertise make him suitable. *See, e.g.*, 2 U.S.C.A. § 687 (West 1985) (duty to bring suit to require release of impounded budget authority under Impoundment Control Act of 1974); 42 U.S.C. § 6384(a) (1982) (duty to impose and collect civil penalties under Energy Policy and Conservation Act of 1975); 15 U.S.C. § 1862 (1982) (member of Chrysler Corporation Loan Guarantee Board); 45 U.S.C. § 711(d)(1)(C) (1982), *as amended by* Pub. L. No. 98-181, tit. II, § 2003(c)(1), 97 Stat. 1297 (1983) (member of Board of Directors of United States Railway Association); 44 U.S.C. § 3512 (1976) (authority to minimize burdens of information collection procedures imposed by other independent regulatory agencies), *repealed by* Pub. L. No. 96-511, 94 Stat. 2822 (1980); 31 U.S.C.A. §§ 3551-56 (West Supp. 1985) (authority to consider bid protests under Competition in Contracting Act of 1984). The last statute codifies and strengthens the bid protest procedures previously followed by the Comptroller General. *See generally* 44 Comp. Gen. 221, 223 (1964); 4 *Report of the Commission on Government Procurement* 40-41 (Dec. 1972).

The Comptroller General also played a significant role in administering federal election campaign reporting requirements under the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-54 (Supp. II 1972), *repealed in part by* Pub. L. No. 93-443, 88 Stat. 1272 (1974)—a role implicitly approved in *dicta* by this Court in *Buckley v. Valeo*, 424 U.S. at 128 n.165. *See infra* pp. 29, 45 & n.137.

[56] Opinion at 30, J.A. 57.

[57] *Id.* at 31, J.A. 58.

under statutes allowing removal of independent officers for cause.

1. ***The purpose of the 1921 removal provision was to ensure the Comptroller General's independence from the President, not to make him subservient to Congress.***

The congressional debates on the bills that led to the 1921 Act make clear that Congress did not intend the removal provision to create a "subservience to another branch." The purpose of that provision was the opposite —to secure for the Comptroller General the maximum degree of independence possible.

The 1921 Act began as a bill (H.R. 9783) introduced in the House of Representatives in 1919.[58] Both Houses passed that bill in 1920, with a provision authorizing removal for cause by concurrent resolution.[59] President Wilson vetoed the bill on June 4, 1920, asserting that the removal provision was unconstitutional because Congress could neither deny the President the exclusive power to remove his appointees nor share in the removal power itself.[60] S. 1084, the bill ultimately signed into law, was enacted in the next Congress. It provided for a 15-year nonrenewable term and removal by joint resolution.[61] In that form, S. 1084 was signed into law by President Harding.[62]

The proponents of H.R. 9783 made clear from the outset that the Comptroller General was to be an officer of

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[58] H.R. 9783, 66th Cong., 1st Sess., 58 Cong. Rec. 6533 (1919). Appendix B sets out relevant legislative history materials for the 1921 Act and its predecessor bills. It also sets out the removal provisions from the various bills, as well as the text of President Wilson's 1920 veto message.

[59] That bill provided indefinite tenure during good behavior, rather than a 15-year nonrenewable term as in the final 1921 Act. 59 Cong. Rec. 7662 (1920).

[60] 59 Cong. Rec. 8609-10 (1920); App. B at 3b-4b.

[61] S. 1084, 67th Cong., 1st Sess., 61 Cong. Rec. 1783, 1784-85 (1921).

[62] 61 Cong. Rec. 2500 (1921).

the United States and therefore had to be appointed as provided in the Appointments Clause. Early in the debates, Representative Byrns emphasized: "This officer, who is to be known as comptroller general, and his assistant must, under the Constitution, be appointed by the President . . . ." [63] That proposition was reiterated throughout the debates leading to passage of the bill.[64]

After President Wilson's veto and Representative Good's reintroduction of the legislation, the following colloquy occurred:

> "Mr. GOODYKOONTZ. Does not he think that the comptroller general would be rather an agent or a mere arm of Congress, which in itself has the power to select committees or agencies to gather information for it, and does not come within the category of general officers contemplated to be beyond the jurisdiction of Congress itself?
>
> "Mr. GOOD. It was the opinion of the committee that framed the law that the officer we were creating here was an officer of the United States, and his appointment would have to fall under the provisions of Article II of section 2 of the Constitution." [65]

Congress never deviated from this view. Congress intended the Comptroller General to be a duly appointed officer of the United States; and this Court in *Buckley v. Valeo* recognized that he is one.[66]

The point of contention was whether and how Congress could protect the new officer from removal at the pleasure of the President. The whole purpose of creating the office of Comptroller General was to make him independent, and therefore he had to be free from the threat of discretionary removal by the President. Although *Myers* was still in the future, this Court had

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[63] 58 Cong. Rec. 7088 (1919).

[64] *E.g., id.* at 7211 (Rep. Temple), 7274 (Rep. Good).

[65] 59 Cong. Rec. 8612 (1920).

[66] 424 U.S. at 128 n.165 (Comptroller General "is appointed by the President in conformity with the Appointments Clause").

already signalled its view that the President's power to remove at pleasure could be restricted, if at all, only by a statute that explicitly denied him that power.[67] Congress, in providing for removal only for cause by concurrent resolution and then by joint resolution, "and for no other cause and in no other manner," believed it was being sufficiently explicit.[68] It was trying to safeguard the Comptroller General's status as an independent officer of the United States, subservient to neither the President nor Congress.

The proponents of the removal provision repeatedly emphasized that it gave the Comptroller General protection analogous to that afforded federal judges because of his "semi-judicial" position—an objective clearly inconsistent with any intent to create a subservience to Congress.[69] Moreover, the proponents had little doubt that, if valid, the provision would operate as intended—protecting against presidential control without creating congressional control:

> "Mr. SIMS. I appreciate the attempt to take this matter away from consideration as a political matter; but does the gentleman think that the President is more likely to act from partisan considerations

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[67] *Shurtleff v. United States*, 189 U.S. 311 (1903).

[68] Representative Good discussed *Shurtleff* in the debates, quoting this Court's statement that a limitation of the presidential removal power would "require very clear and explicit language." 189 U.S. at 315, *quoted in* 59 Cong. Rec. 8612 (1920). He then quoted the bill's removal provision and declared: "I submit that it is not possible for the human tongue to frame a provision that is more explicit and definite than that. We have not in this language drawn a provision that can be misconstrued by anyone. It is just as clear, it is just as forceful, as language can make it." *Id.*; *see also* 61 Cong. Rec. 983 (1921) (Rep. Good) (discussing removal cases); *id.* at 990-91 (Rep. Connally) (discussing *Shurtleff* and other removal cases).

[69] *E.g.*, 61 Cong. Rec. 1079 (Rep. Good) (1921); 59 Cong. Rec. 8610 (1920) (Rep. Good); 58 Cong. Rec. 7282 (1919) (Rep. Good); *id.* at 7136 (Rep. Hawley); *id.* at 7131 (Rep. Good).

than would a partisan Congress, where both Houses are of the same political party?

"Mr. GOOD. That is one of the reasons why we provided in the law the causes for removal, and the only causes are inefficiency, incapacity, neglect of duty, malfeasance in office, or some offense that involves moral turpitude." [70]

Indeed, some Members objected that too much protection was afforded by the removal provision. They argued that in practice it would guarantee the Comptroller General tenure for his full term because the required "trial[s]" in both Houses would create a "never-ending proceeding." [71]

To emphasize the Comptroller General's independence from the President, the proponents of the bills sometimes referred to him as an "arm" or "agent" of Congress. Those terms were frequently used at the time, not to indicate subservience to the wishes of Congress, but to express in shorthand form the proposition that an officer was to perform statutorily prescribed functions, with protection against discretionary removal by the President.

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[70] 59 Cong. Rec. 8612 (1920); *see* 61 Cong. Rec. 978 (1921) (Rep. Fess) ("His term of office does not depend upon the favor of anyone . . . . His tenure is not contingent, hence his conduct is independent . . . ."); 58 Cong. Rec. 7282 (1919) (Reps. Bland and Good).

[71] *E.g.*, 58 Cong. Rec. 7279-80 (1919) (Rep. Candler); *id.* at 7205-06 (Rep. Steagall); 61 Cong. Rec. 1083-84 (1921) (Rep. Parker). Other Members believed that removal by concurrent resolution would be comparatively simple. It is apparent that at least some of these Members believed that the concurrent resolution would not require presidential signature. *See, e.g.*, 58 Cong. Rec. 7211 (1919) (Rep. Temple); 61 Cong. Rec. 996 (1921) (Rep. Stevenson). On the other hand, Representative Good expressed the view that a concurrent resolution removing a Comptroller General would have the force of law, and as such would require presidential signature; thus, to avoid confusion, the House conferees later agreed to the Senate's suggestion to substitute "joint" for "concurrent" in the final Act. 61 Cong. Rec. 1855 (1921).

Examples of this usage can be found in Justice Sutherland's description of the Federal Trade Commission as an "agency of the legislative and judicial departments" [72] and in the many references to the Interstate Commerce Commission as an "arm" of Congress.[73] Professor Cushman, based on an extensive study, found those terms to be merely conclusory synonyms for "independence." [74] It is in this sense of "independence" that the proponents of the 1921 Act must be understood, and it was to this independence that the critics of the 1921 Act objected. For example, Solicitor General Beck in the *Myers* case attacked the 1921 removal provision as unconstitutional because the Comptroller General was, in his view, an "official of the executive department" who should be removable by the President at will.[75]

2. *This Court's decisions foreclose any inference that a statutory power to remove only for cause makes an officer subservient to the removing authority.*

The salient feature of the 1921 removal provision is its limited scope. Apart from impeachment, a Comptroller General can be removed during his 15-year term only for cause, after hearing, by a joint resolution passed by both Houses of Congress and signed by the President.

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[72] *Humphrey's Executor*, 295 U.S. at 630.

[73] Cushman, *The Constitutional Status of the Independent Regulatory Commissions* (pt. 1), 24 Cornell L.Q. 13, 13-14 (1938); *id.* (pt. 2), 24 Cornell L.Q. 163, 165 n.11, 167 (1939). Chief Justice Hughes even referred to the Secretary of Agriculture as an "agent of Congress" in performing his functions under the Packers and Stockyards Act. *Morgan v. United States*, 298 U.S. 468, 479 (1936). This Court brushed aside a recent attempt to give such terms legal significance when it stated that, notwithstanding a characterization of the Comptroller General as a "legislative officer," his appointment is made pursuant to the Appointments Clause. *Buckley v. Valeo*, 424 U.S. at 128 n.165.

[74] Cushman, *supra*, at 165-67.

[75] Substitute Brief for the United States on Reargument 96, 99-100 (Apr. 13, 1925), *Myers*.

If the President opposes removal and vetoes the resolution, an override requires passage again by a two-thirds vote of both Houses.[76] As a practical matter, removal in this manner would involve more participants and be more difficult than removal for cause by the President acting alone, which is the method expressly authorized by the statutes creating the positions of many other independent officers.[77] It is not facially apparent that the possibility of removal for cause by joint resolution after hearing makes an officer subservient to the removing authority.

Humphrey's Executor strongly implies that such a possibility does not create subservience. In upholding the power of Congress to permit presidential removal of Federal Trade Commissioners only for cause, the Court there stressed the congressional intent that Commissioners be "free from 'political domination or control' or the 'probability or possibility of such a thing.'" [78] The Court found that the statute achieved this objective. The Court clearly did not believe that the President's power to remove Commissioners for cause made them subservient or impaired their "free[dom] from executive control." [79] It is equally difficult to see how a congressional power to remove the Comptroller General for cause by joint resolution, which is subject to greater procedural constraints than the presidential removal clause before the Court in *Humphrey's Executor*, creates a "subservience" to Congress.

This Court's decisions in *Wiener v. United States* [80] and *Buckley* also conflict with the lower court's reason-

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[76] 31 U.S.C. § 703(e)(1) (1982), J.A. 102; *see* U.S. Const. art. I, § 7, cl. 3.

[77] Even removal by impeachment requires a two-thirds vote only in the Senate, after a mere majority vote of the House, and requires no action by the President. *See* U.S. Const. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

[78] 295 U.S. at 625 (quoting floor debates).

[79] *Id.* at 628.

[80] 357 U.S. 349 (1958).

ing. In *Wiener*, the Court found that Congress intended the War Claims Commission "'to exercise its judgment without the leave or hindrance of any other official or any department of the government.'"[81] To achieve that end, the Court inferred that the statute, which was silent on removal, barred removal at the pleasure of the President. And *Buckley*, in holding that administrative functions under the election statute could be performed only by officers appointed under the Appointments Clause, referred specifically to the Comptroller General as an officer who could perform those functions—and who had done so under an earlier version of that statute.[82] The Court made no reference to the provision of the 1921 Act making the Comptroller General removable for cause by joint resolution.[83]

The district court sought support for its presumption of subservience from this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[84] But that case was very different from this one. This Court found there that a statute creating the new office of bankruptcy judge plainly denied the judges Article III status, because it gave them 14-year terms, made their salaries subject to diminution, and authorized their removal for cause by the judicial council of the circuit in which they served.[85] The district court here analo-

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[81] *Id.* at 353 (quoting *Humphrey's Executor*, 295 U.S. at 625-26).

[82] 424 U.S. at 128 n.165; *see supra* note 55.

[83] *See also Ameron, Inc. v. United States Army Corps of Engineers*, 607 F. Supp. 962, 972 (D.N.J. 1985), *appeal pending* (upholding the capacity of the Comptroller General to perform administrative functions under the Competition in Contracting Act because he is appointed by the President under a statutory scheme "substantially similar to that challenged in *Humphrey's Executor*"); *accord Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985).

[84] 458 U.S. 50 (1982) (plurality opinion), *discussed in* Opinion at 29-34, J.A. 56-61.

[85] 458 U.S. at 60-61; *compare* U.S. Const. art. III, § 1. Since Congress had left "no doubt" about the non-Article III status of

gized the 1921 removal provision to the 14-year term of the bankruptcy judge, which creates the possibility of nonrenewal. Both, it said, generate a desire to please the reappointing or removing authority and an impermissible "here-and-now subservience to another branch." [86] That theory proves far too much. Under that view, every independent officer serving a term of years who is subject to Senate confirmation of his reappointment would have to be viewed as subservient to the legislative branch.[87] *Northern Pipeline* does not establish such an extreme proposition, because it is based on the special constitutional status of Article III judges, whose tenure "during good Behaviour" [88] is facially inconsistent with a 14-year term.

To the extent that *Northern Pipeline* is relevant here, it tends to refute the district court's reasoning. The statute there made the judges subject to removal for cause by a judicial council composed of Article III judges. On the district court's theory, such a removal provision for these Article I judges created an impermissible "subservience" to the Article III judiciary, and presumably would have rendered the judges incapable of exercising even Article I functions. But the Court reached no such conclusion. It treated those judges as officers of the United States fully capable of performing functions that did not require the status of a judge with Article III tenure "during good Behaviour."

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the judges, the issue in this Court was not their status but whether particular functions could be delegated to them in light of their non-Article III status. 458 U.S. at 61.

[86] Opinion at 30, J.A. 57.

[87] Indeed, since consent to reappointment can be denied by a majority vote of the Senate alone, for unspecified reasons, such officers might be considered *more* subservient than the Comptroller General, who is removable only for cause by joint resolution and who cannot succeed himself.

[88] U.S. Const. art. III, § 1.

3. *Neither the President nor Congress has exercised a statutory power to remove an independent officer for cause.*

The "subservience" that was "presumed" by the district court[89] is not substantiated by experience under statutes making independent officers removable only for cause. To the contrary, our research has disclosed no instance since the creation of the Interstate Commerce Commission in 1887 in which the President or Congress has removed a member of an independent agency for statutorily prescribed cause.[90] *Humphrey's Executor* and *Wiener*, of course, involved attempted removals at the *pleasure* of the President, which were ruled unlawful under the statutory protections (express and implied, respectively) that were applicable. This history tends to show that statutes allowing removal only for cause do in fact make independent officers "free from 'political domination or control' " by the removing authority.[91]

The history of the 1921 Act confirms that it has succeeded in making the Comptroller General independent rather than subservient. In the 65 years since that statute became law, neither Congress nor the President has ever tried to remove a Comptroller General. And we know of no claim that any decision of the Comptroller General was ever improperly influenced by Congress or by the President. There are, in fact, many instances in

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[89] Opinion at 30, J.A. 57.

[90] There have been instances of independent officers who have resigned following disclosure of conduct reflecting on their integrity that might have provided cause for removal. However, we have found no case in which an officer who did not resign was removed for cause.

Justice Brandeis' dissent in *Myers* lists some early removals that were said by the President to be "for cause." 272 U.S. at 259-60 n.28. However, those removals were under statutes that did not restrict removal (as distinguished from suspension during a senatorial recess) to cause. *See id.*; Act of March 2, 1867, ch. 154, 14 Stat. 430; Act of July 12, 1876, ch. 179, 19 Stat. 80, 81.

[91] *Humphrey's Executor*, 295 U.S. at 625.

which the Comptroller General has taken positions contrary to those suggested by Members or committees of Congress or by officers of the Executive Branch.[92] No factual basis exists for believing that the removal provision has made the Comptroller General subservient to Congress.

The district court's ruling, and the erroneous presumption of subservience on which it is based, reflect an unduly rigid view of the separation of powers that seeks to prevent any intermixture of the branches of government.[93] The Founding Fathers did not view the separation of powers so mechanically. In defending the proposed Constitution against the charge that some of its provisions violated Montesquieu's famous maxim, which is quoted by the district court,[94] Madison argued that the maxim "has been totally misconceived and applied." [95] According to Madison, Montesquieu

> "did not mean that the departments [of government] ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." [96]

Madison thus recognized, as has this Court, that "a hermetic sealing off of the three branches of Government

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[92] *See, e.g.*, 64 Comp. Gen. 22 (1984) (allocation of Health and Human Services funds); 61 Comp. Gen. 520, 521 (1982) (Panama Canal); 61 Comp. Gen. 482, 485, 489 (1982) (termination of fossil energy research and development efforts); 53 Comp. Gen. 600 (1974) (provision of Secret Service protection to former executive official).

[93] *See* Opinion at 40-41, 46, 49-50, J.A. 68-70, 75, 78-80.

[94] *Id.* at 46, J.A. 75.

[95] *The Federalist* No. 47, at 337 (B.F. Wright ed. 1961).

[96] *Id.* at 338 (emphasis in original).

from one another would preclude the establishment of a Nation capable of governing itself effectively." [97] As Professor Paul M. Bator has observed:

> "[I]t was, precisely, the intention of the Framers that [the separation-of-powers] provisions be understood as setting out very general guidelines rather than as defining a rigid table of organization. Indeed, if we look at the Constitution as a whole, we see that its fundamental genius, its most pervasive institutional tactic, is not separation of powers at all, but, rather, checks and balances—a mixing of functions rather than a rigid separation among them." [98]

III. IF THE 1921 REMOVAL PROVISION IS RULED INCOMPATIBLE WITH THE COMPTROLLER GENERAL'S PERFORMANCE OF ADMINISTRATIVE FUNCTIONS, IT SHOULD BE HELD INVALID AND SEVERED FROM THE BALANCE OF THE 1921 ACT AND THEREFORE DISREGARDED IN DETERMINING THE CONSTITUTIONALITY OF THE 1985 ACT.

As we have shown, any incompatibility between the 1921 removal provision and the 1985 delegation of administrative functions existed equally within the 1921 Act itself. Congress in 1921 made clear how it intended any such incompatibility to be resolved: by severing the removal provision and preserving the balance of the 1921 Act. Any invalidity in the removal provision therefore should have no effect on the constitutionality of the

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[97] *Buckley v. Valeo*, 424 U.S. at 121; *see also* L. Jaffe, *Judicial Control of Administrative Action* 28-29, 32-33 (1965).

[98] P. Bator, *The Constitution and the Art of Practical Government* 15-16, Address to Law Club (Chicago, Ill. Feb. 5, 1986); *see The Federalist* No. 48, *supra*, at 343 (J. Madison) (the departments must be "so far connected and blended as to give to each a constitutional control over the others"). The decision in *Humphrey's Executor* was thus based not in "political science preconceptions characteristic of its era," as the district court charged, Opinion at 40, J.A. 68, but in constitutional "preconceptions" dating back to the founding of our nation.

trigger mechanism in the 1985 Act, particularly since Congress in 1985 did not rely on the existence of the 1921 removal provision.

A. Congress Would Have Intended the Balance of the 1921 Act to Survive If the Removal Provision Were Found to Be Incompatible with the Comptroller General's Performance of His Administrative Functions Under that Act.

In 1921, as we have noted, the scope of the President's removal power and the right of Congress to share in the removal process were still largely undefined by this Court. When the proponents of the 1921 Act included the removal provision as a means of ensuring the Comptroller General's independence from the President, they were aware of the controversy surrounding that provision and they expected it would be severed if it were held unconstitutional. On the day the House received President Wilson's veto of the 1920 bill, the following colloquy occurred in the course of an unsuccessful attempt to override:

> "Mr. PELL. If we pass this over the President's veto and then the Supreme Court should uphold the contention of the President, this bill would not fail, would it? The bill would continue.
>
> "Mr. BLANTON. Certainly.
>
> "Mr. PELL. The failure of this one clause would not destroy the whole thing?
>
> "Mr. GOOD. I have not given that any consideration. I think it is very remote." [99]

Representative Good also stated that, "if the statute is unconstitutional or any provision of the statute is unconstitutional, then *to that extent* the statute must necessarily fall." [100]

Moreover, Representative Good, a staunch proponent of the concurrent and joint resolution procedures, made clear

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[99] 59 Cong. Rec. 8611 (1920).

[100] *Id.* at 8610 (emphasis added).

that he was willing to sacrifice those procedures in order to enact the remainder of the bill. The day following the veto, the House at his urging passed a bill identical to the vetoed one except that the tenure provision said simply that the Comptroller General would hold office during good behavior.[101] In passing the bill, the House recognized that the "good behavior" limitation might not prevent the President from removing the Comptroller General for cause, and perhaps even at will.[102]

This history leaves no doubt that Congress intended the removal provision to be severable from the remainder of the 1921 Act. It chose the joint resolution procedure as a way to protect against removal by the President at will. At the same time, the bill's proponents made clear that if the removal provision were held invalid, they wanted the rest of the Act to survive.

The rest of the Act made the GAO and the Comptroller General independent of the Executive Branch and gave the Comptroller General a 15-year nonrenewable term.

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[101] H.R. 14,441, 66th Cong., 2d Sess., 59 Cong. Rec. 8647, 8656 (1920). The new bill as first introduced provided for appointment and removal by the Supreme Court. *Id.* at 8648. This proved controversial (for reasons unrelated to any desire to retain the power in Congress), and Rep. Good amended the language to that described above. *Id.* at 8656.

[102] *Id.* at 8657 (Reps. Mondell and Blanton), 8652 (Rep. Good). The new bill was promptly introduced in the Senate, *id.* at 8625, but no vote was taken before the second session of the 66th Congress ended that day. In the discussion that did occur, a number of Senators advocated passage, while maintaining that the removal provision in the vetoed bill was constitutional. *Id.* at 8626 (Sens. Kenyon and Borah). During the short third session, the new bill was raised but was passed over because of the absence of Senators who had expressed the wish to be present for the bill's consideration. 60 Cong. Rec. 2001 (1921). The Senate, however, had previously shown its willingness to forego a congressional role in removal: In the early consideration of the original bill, the Senate amended the House version to remove the concurrent resolution procedure and to provide simply for removal "for cause." *See* H.R. 9783, § 21, 66th Cong., 2d Sess., 59 Cong. Rec. 6279 (1920); 59 Cong. Rec. 6280 (1920) (amendment accepted by Senate).

Even though severance of the removal provision would leave the 1921 Act silent on the removal question, there can be no doubt the 1921 Congress would have preferred this to the *status quo* of a Comptroller of the Treasury controlled by the President and removable by him at will. Accordingly, severance of the removal provision would do no violence to what Congress intended in 1921. And that is most particularly true today since the Comptroller General would now be protected by the principle of *Wiener*, and would not be removable by the President at will.[103]

B. Under this Court's Severability Decisions, the Removal Provision Is Severable from the Balance of the 1921 Act.

This Court's severability precedents establish that the invalidity of part of a law will not affect the validity of the remainder (1) if the valid provisions are capable of standing alone, and (2) if the legislature would have intended the valid provisions to stand absent the invalid provisions.[104] When these conditions are met, "[t]he offending provision—whether section, sentence, phrase or individual word—can be excised" to preserve the balance of the statute.[105]

Recent decisions have made clear that the presumption is in favor of severability. In *Buckley v. Valeo*, the Court stated the rule as follows:

> "Unless it is *evident* that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the in-

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[103] *Wiener* confirmed that an independent officer is impliedly protected from discretionary removal even when the organic statute is silent on the question. *See supra* pp. 28-29.

[104] *See* Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76 (1937).

[105] *Id.* at 106.

> valid part may be dropped if what is left is fully operative as a law." [106]

Similarly, in *Regan v. Time, Inc.*, the Court, while acknowledging that severability is primarily a question of legislative intent, underscored that "the presumption is in favor of severability." [107]

Both parts of the severability test are satisfied here. First, the remainder of the 1921 Act is fully capable of standing alone if the removal provision is excised. That provision's presence or absence has no effect whatever on the portion of the 1921 Act establishing the office of the Comptroller General; likewise, it has no effect on the other portions of the 1921 Act establishing the Bureau of the Budget (now OMB) and the executive budget process.

Second, as we have shown, Congress intended the remainder of the 1921 Act to stand if the removal provision were ruled unconstitutional. Even if the legislative intent were less clear on this point, any uncertainty would require severance rather than invalidation of the entire 1921 Act. To reach a conclusion of nonseverability, the Court would have to find it "evident" that Congress would not have enacted the remainder of the 1921 Act without the removal provision. The purpose and history of the statute preclude such a finding. If the Court concludes that the removal provision of the 1921 Act is unconstitutional, it should sever that provision and preserve the remainder of the statute.

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[106] 424 U.S. at 108 (emphasis added) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)); *accord INS v. Chadha*, 462 U.S. 919, 931-35 (1983).

[107] 104 S. Ct. 3262, 3269 (1984) (plurality opinion). The Court reasoned that, because a ruling of unconstitutionality "frustrates the intent of the elected representatives of the people," the Court should act with restraint and "refrain from invalidating more of the statute than is necessary." 104 S. Ct. at 3269.

C. Severance of the 1921 Removal Provision Would Eliminate Any Obstacle to the Comptroller General's Performance of His Administrative Functions Under the 1985 Act.

1. *Congress in 1985 chose the Comptroller General because he is an independent officer of the United States, not because of a belief that he is subservient to Congress.*

The district court was "doubtful" that Congress in 1985 would have delegated the functions it did to the Comptroller General "if the Comptroller General were not removable by Congress." [108] It cited no legislative history to support that "presumed congressional intent," but simply mentioned that Congress chose the Comptroller General over the Director of OMB because of the latter's "pro-executive bias." [109] The court's non sequitur is obvious: The fact that Congress chose the Comptroller General because he is independent of the Executive does not mean that it chose him because he is subservient to Congress. And the legislative history of the 1985 Act refutes the court's unwarranted presumption: Just as Congress in 1921 intended the Comptroller General to be independent of both political branches, it chose him in 1985 for his factfinding role because he has proven to be independent of both political branches throughout the 65-year history of the office.

The selection of the Comptroller General to perform the reporting function that is the heart of the 1985 Act was a compromise designed to resolve objections raised by each House to the approach initially taken by the other. In the Senate, the bill as introduced and passed delegated the factfinding responsibilities to the Directors of OMB and CBO, acting jointly.[110] If the Directors

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[108] Opinion at 33, J.A. 60.

[109] *Id.*

[110] 131 Cong. Rec. S12,562, S12,564 (daily ed. Oct. 3, 1985). The proposal was introduced by Senators Gramm, Rudman, and Hollings on the Senate floor as an amendment to a House bill to increase the federal debt ceiling. *Id.* at S12,561-62.

failed to agree, they were to average their differing findings. The House countered by passing a bill that entrusted the factual determinations to the Director of CBO, acting "in consultation with" the Director of OMB.[111]

Opponents of the Senate version charged that the role it gave to OMB amounted to an unconstitutional transfer of legislative power to the President.[112] On a practical level, opponents also argued (and some supporters acknowledged) that OMB operated as "a truly partisan arm of the President" [113] and was likely to use its power under the Act to try to achieve whatever result the President desired.[114]

At the same time, opponents of both the Senate and House approaches saw constitutional problems in the roles each gave to CBO. Although they viewed CBO as nonpartisan,[115] they believed that its Director could be given only an advisory role, because he is appointed by Congress and is not a duly appointed officer of the United States.[116]

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[111] 131 Cong. Rec. H9577, H9590-92 (daily ed. Nov. 1, 1985).

[112] *E.g.*, 131 Cong. Rec. H9606-09 (daily ed. Nov. 1, 1985) (remarks of Rep. Rodino; Letter from Rep. Rodino to Rep. Rostenkowski; Letter from Prof. Laurence H. Tribe, Harvard University Law School, to Rep. Mike Synar); *id.* at S12,630-31 (Oct. 4) (remarks of Sen. Johnston); *id.* at S12,708 (Oct. 5) (remarks of Sen. Hart); *see also id.* at S12,670 (Oct. 4) (remarks of Sen. Rudman).

[113] 131 Cong. Rec. S12,754 (daily ed. Oct. 6, 1985) (remarks of Sen. Glenn); *accord id.* at S12,701 (Oct. 5) (remarks of Sen. Hart); *id.* (remarks of Sen. Rudman); *id.* at S12,753 (Oct. 6) (remarks of Sen. Chiles); *id.* at S12,897 (Oct. 8) (remarks of Sen. Chiles).

[114] *E.g.*, *id.* at S12,754 (daily ed. Oct. 6, 1985) (remarks of Sen. Glenn); *id.* at S12,978 (Oct. 9) (House Democratic Study Group analysis, submitted by Sen. Riegle); *id.* at S13,113 (Oct. 10) (remarks of Sen. Byrd).

[115] *E.g.*, 131 Cong. Rec. S12,754 (daily ed. Oct. 6, 1985) (remarks of Sen. Glenn); *id.* at S12,907 (Oct. 8) (remarks of Sen. Chiles); *id.* at S12,978 (Oct. 9) (House Democratic Study Group analysis).

[116] *E.g.*, 131 Cong. Rec. H9608-09 (daily ed. Nov. 1, 1985) (Letter from Prof. Laurence H. Tribe, Harvard University Law School, to

To resolve all of these concerns, a substitute was proposed by the Senate and adopted by both Houses, delegating the factfinding functions to the Comptroller General, with advice from OMB and CBO.[117] Congress viewed the Comptroller General's qualifications for the job to be his status as an "executive" officer[118] constitutionally capable of performing administrative functions that CBO could not, his independence from both political branches, and his reputation for fairness and impartiality deriving from that independence.[119] Our research discloses no reference to the 1921 removal provision, and no

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Rep. Mike Synar, submitted by Rep. Rodino); *see e.g., id.* at S14,658 (remarks of Sen. Packwood); *id.* at S14,661 (remarks of Sen. Gramm); *id.* at H9866 (Nov. 6) (remarks of Rep. Lott).

[117] The new mechanism was first introduced in the Senate as part of a package of amendments sponsored by Senators Packwood and Domenici. 131 Cong. Rec. S14,745, S14,748-49 (daily ed. Nov. 4, 1985); *see id.* at S14,658-59 (Nov. 1) (remarks of Sen. Packwood). It was ultimately adopted by the Senate and House conferees and then passed by both Houses. H.R. Rep. No. 433, 99th Cong., 1st Sess. 72-84 (1985) ("Conf. Report"), *reprinted in* 1985 U.S. Code Cong. & Ad. News 988; 131 Cong. Rec. H11,903-04 (daily ed. Dec. 11, 1985) (House passage); *id.* at S17,443-44 (Senate passage).

[118] *See* 131 Cong. Rec. S14,659 (daily ed. Nov. 1, 1985) (Sen. Packwood) (GAO is an "executive agency"); *id.* at S14,666 (Sen. Hollings) (GAO "is an executive body. It can make orders."); *cf.* 5 U.S.C. §§ 104-105 (1982) (GAO is an "Executive agency").

[119] *See* 131 Cong. Rec. H9864 (daily ed. Nov. 6, 1985) (Rep. Cheney) ("We have wrestled with the constitutional questions. We have included GAO. I am personally convinced, based upon the work that the American Law Division has done at the Library of Congress, that this is indeed a constitutional package."); *id.* at H11,894 (Dec. 11) (Rep. Weiss) (conceding, as opponent of the bill, that having the Comptroller General 'acting as an arbiter" between OMB and CBO will make it "more difficult for the administration to manipulate its estimates of deficit figures for political reasons"); *id.* at E5622 (Rep. Bedell) ("[T]he compromise version greatly reduces the opportunity for political manipulation of the automatic cut process, and ensures that such cuts would be fairly made. . . . The General Accounting Office is a nonpartisan office whose director is appointed for a 15-year term, and is responsible to both the President and Congress.").

suggestion that the Comptroller General would favor CBO over OMB if they disagreed over deficit projections.

The district court found that the inclusion in the 1985 Act of a fallback deficit reduction mechanism "strongly suggested" a "congressional intent that it is the Comptroller General's powers under this Act, rather than his manner of removal, that should yield if both cannot coexist." [120] That inference is unwarranted. Congress included the fallback mechanism, under which the deficit reduction process would be returned to Congress for a joint resolution if the primary mechanism were held invalid,[121] in response to the constitutional objections that had been raised during its deliberations.[122] Those objections related primarily to the role of the CBO and the asserted overbreadth of the delegation. The congressional debates do not indicate that, overbreadth aside, any objection was raised to the Comptroller General's constitutional capacity to perform his duties under the Act. The Members' explanations of why the fallback was included make no reference to the Comptroller General's status. Indeed, nowhere in the published deliberations did anyone dispute the characterizations of the Comptroller General as an "executive" officer whose role would avoid the constitutional issues attending CBO's performance of the factfinding function. Although the President's signing statement objects to the Comptroller General's role, even it does not mention the 1921 removal provision as the basis of any constitutional concerns about the Act. Moreover, his principal objection, that the Comptroller General is an agent or officer of Congress, was not mentioned in the legislative history and was not adopted by the district court.

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[120] Opinion at 33, J.A. 60.

[121] Act § 274(f), J.A. 165.

[122] *See* 131 Cong. Rec. S14,658-59 (daily ed. Nov. 1, 1985) (remarks of Sen. Packwood); *id.* at H9867 (Nov. 6) (remarks of Rep. Lott); Conf. Report at 100 (fallback was included "as a 'Fail Safe' mechanism against a successful contrary claim upsetting the balanced provisions of the Act").

The fallback mechanism thus reflects a congressional intent to save at least the deficit reduction goals of the Act even if the trigger mechanism were held to involve excessive delegation of legislative power or if the CBO were ruled incapable of performing even its advisory role. There is nothing to suggest that it reflects an effort to preserve the never-mentioned removal provision of the 1921 Act.

2. *The functions delegated to the Comptroller General by the 1985 Act are qualitatively no more "executive powers" than those delegated to independent officers by the 1921 Act and many other statutes.*

The opinion below suggests—but does not hold—that the functions assigned to the Comptroller General by the 1985 Act cannot be delegated to an independent officer, even one removable only by the President for cause.[123] The district court characterized the Comptroller General's functions under the 1985 Act as "executive powers," and distinguished them in this respect from the functions this Court has held may be delegated to independent officers in *Humphrey's Executor* and subsequent cases.[124] It is not clear what the district court meant by the term "executive powers."[125] In any event, this Court's

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[123] Opinion at 33, 38 n.25, 42-47, J.A. 60, 66, 70-76.

[124] *Id.* at 38 n.25, 44, J.A. 66, 73.

[125] The court said it was using the term "executive powers" to mean "executive power in the constitutional sense," as this Court used that expression in *Humphrey's Executor*. Opinion at 38 n.25 (quoting 295 U.S. at 628 & n.*). However, this Court appears to have used the latter expression to refer to powers that are so inherently executive that they may be performed only by "purely executive officers" who are subject to removal at the pleasure of the President. This Court distinguished such powers from the "executive function[s]" that it held the Federal Trade Commission could perform as an independent agency. 295 U.S. at 628. The district court here expressly declined to rule that the functions assigned to the Comptroller General by the 1985 Act may be performed only by "purely executive officers" removable at the pleasure

previous decisions have upheld the performance by independent officers of functions more "executive" from a constitutional standpoint than those at issue here.

Among the provisions of the Federal Trade Commission Act considered by this Court in *Humphrey's Executor* was Section 5, which declared illegal "unfair methods of competition in commerce" and "empowered and directed" the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce."[126] As the Court noted, the Commission had enforcement authority with respect to such violations, including the power to issue cease and desist orders and to resort to the courts.[127] Such civil enforcement functions are executive functions that may be performed only by officers of the United States, as this Court later held in *Buckley v. Valeo*.[128] Yet this Court in *Humphrey's Executor* upheld the constitutionality of assigning such authority to independent Commissioners removable by the President only for cause.

The Comptroller General's factfinding functions under the 1985 Act are less "executive" than those enforcement functions. They are factfinding functions of a type that are commonly delegated to independent agencies.

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of the President. Opinion at 33, J.A. 60. Indeed, the court noted that the factfinding functions assigned to the Comptroller General are far more circumscribed than functions assigned to other independent agencies. The Comptroller General "is not made responsible for a single *policy* judgment." Opinion at 24-25, J.A. 51 (emphasis in original).

[126] Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45 (1982)), *quoted in* 295 U.S. at 620.

[127] 295 U.S. at 620-21; *see* Federal Trade Commission Act, *supra*, § 5. The Commission also had power to enforce Sections 2, 3, 7, and 8 of the Clayton Act. Pub. L. No. 63-212, § 11, 38 Stat. 730, 734 (1914) (current version at 15 U.S.C. § 21 (1982)); *see United States v. Philadelphia National Bank*, 374 U.S. 321, 339 & n.17, 346-48 (1963).

[128] 424 U.S. at 138-41.

In order to project the size of the budget deficit, the Comptroller General must make predictive findings of fact—involving less discretion than the judgments made by other independent officers, such as the members of the International Trade Commission in finding import injury to domestic industries.[129] In order to calculate the reductions necessary in particular accounts, he must apply detailed statutory directions to the complex federal accounting structure—a function not unlike the auditing, account settlement, and certification functions he has long performed.

The court below recognized that these "administrative decisionmaking" functions are similar to "many others committed to the charge of administrative officials." [130] The court specifically likened the Comptroller General's forecasting responsibility to "the complex economic calculations required of the agenc[y] that determine[s] the discount rate" [131]—that is, the independent officers appointed to the Board of Governors of the Federal Reserve System.[132] In fact, the court noted that the responsibilities of the Comptroller General under the 1985 Act are narrower than those of many administrative agencies, since "the *only* discretion conferred is the ascertainment of facts and the prediction of facts." [133] The Comptroller General "is not made responsible for a single *policy* judgment." [134]

The district court deemed the Comptroller General's factfinding functions to be peculiarly "executive" because the President is bound by the Comptroller General's findings in issuing his sequestration order.[135] However, it is

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[129] *See* 19 U.S.C.A. §§ 1671b, 1671d, 1673b, 1673d (1982 & West Supp. 1985).

[130] Opinion at 24, J.A. 50-51.

[131] *Id.*

[132] *See* Federal Reserve Act § 12A, 12 U.S.C. § 263 (1982).

[133] Opinion at 24-25, J.A. 51 (emphasis in original).

[134] *Id.* at 25, J.A. 51 (emphasis in original).

[135] *Id.* at 44, J.A. 73.

commonplace for Congress to delegate factfinding responsibilities to independent agencies and to give the agencies' determinations the effect of law, binding both on the executive departments and on private individuals. This Court in *Wiener* was not troubled by the fact that the statute before it made the findings of the War Claims Commission binding on the Secretary of the Treasury, who was required to pay awards rendered by the Commission.[136] Similarly, the administrative determinations of the Federal Election Commission necessarily bind the President, who (when he seeks reelection) is one of the candidates whose campaign activities the Commission regulates. Yet this Court in *Buckley* made clear that independent officers appointed for a term of years under the Appointments Clause could perform the functions delegated by the Federal Election Campaign Act.[137] Further, as noted above, many of the Comptroller General's determinations under the 1921 Act are expressly made binding on the executive departments.[138] Many other examples could be given;[139] these suffice to

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[136] The War Claims Commission was established to determine claimants' entitlements to a "War Claims Fund in the hands of the Secretary of the Treasury." The Secretary was to pay out of the Fund awards rendered by the Commission, which were "not subject to review by any other official of the United States or by any court by mandamus or otherwise." 357 U.S. at 354-55.

[137] *See* 424 U.S. at 137-41. The Court mentioned the Comptroller General as such an officer, noting that he had performed administrative functions under an earlier version of the election statute. *Id.* at 128 n.165. After *Buckley*, Congress reenacted the statute, delegating the same functions to a Commission whose voting members are all appointed under the Appointments Clause. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

[138] *See supra* p. 19; App. A.

[139] *E.g.*, 19 U.S.C.A. §§ 1671b, 1671d, 1673b, 1673d (1982 & West Supp. 1985) (in antidumping and countervailing-duty proceedings, the International Trade Commission's injury determinations are conclusive on the Department of Commerce); 19 U.S.C.A. §§ 2251-52 (1982 & West Supp. 1985) (under "escape clause" provision, ITC's finding of injury or threat of injury due to excessive imports

illustrate that the very reason for establishing an independent officer of the United States would generally be frustrated if such an officer were incapable of making decisions that bind the executive departments.

It is therefore clear that the functions assigned to the Comptroller General by the 1985 Act may be delegated to an independent officer protected against removal "at the mere will of the President."[140] Whether the 1921 removal provision is upheld as not creating an impermissible "subservience" to another branch, or whether it is ruled unconstitutional and severed from the balance of the 1921 Act, there is no constitutional impediment to the Comptroller General's performance of the factfinding functions assigned to him by the 1985 Act.

There may well be "executive powers" that can be assigned only to officers removable at the pleasure of the President, such as the conduct of foreign policy that was the focus of the congressional decision of 1789. However, no bright and immutable constitutional line can be drawn to encircle such powers—indeed, the postmasters who were so "purely executive" in *Myers* only 60 years ago are no longer appointed or removable by the President. They now serve in the United States Postal Service, an "independent establishment of the executive branch."[141] The President appoints and the Senate confirms only its Governors, who serve statutory terms of nine years and are removable by the President only for cause.[142] And it is clear that the territory with-

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is conclusive, and the President must order import relief unless he finds that relief would be contrary to the national economic interest); 28 U.S.C. §§ 171, 173 (1982) (U.S. Claims Court—an Article I court, the judges of which are removable by the U.S. Court of Appeals for the Federal Circuit—may render judgments against executive departments, grant equitable relief, and order the payment of damages).

[140] *Humphrey's Executor*, 295 U.S. at 626.

[141] 39 U.S.C. § 201 (1982).

[142] 39 U.S.C. § 202 (1982 & Supp. I 1983). The Postal Rate Commission is likewise "independent," and its Commissioners are also removable only for cause. 39 U.S.C. § 3601 (1982).

in that "purely executive" circle excludes many functions —like civil enforcement tasks—typically thought of as "executive." [143] Whatever such "purely executive powers" may be, the factfinding functions assigned to the Comptroller General by the 1985 Act are not among them.

IV. IF THE 1921 REMOVAL PROVISION IS HELD UNCONSTITUTIONAL *PER SE* AS DENYING THE PRESIDENT THE SOLE POWER TO REMOVE HIS APPOINTEE FOR CAUSE, IT SHOULD BE SEVERED FROM THE BALANCE OF THE 1921 ACT AND DISREGARDED IN DETERMINING THE CONSTITUTIONALITY OF THE 1985 ACT.

As noted above, President Wilson asserted in his 1920 veto message that the President can insist on the power to remove any non-Article III officer of the United States he has appointed and that Congress may not share in this power.[144] He advanced that view without reference to the issue of subservience to another branch; indeed, he construed Article II as *per se* requiring the total subservience of all such officers to the President. The majority of this Court adopted that view in *Myers*, six years after Wilson's veto.[145] The Solicitor General argued in *Myers* that the 1921 Act creating the office of Comptroller General was a prime example of the mischief that could result if the President was denied the sole power to remove an officer he appoints.[146] The majority opinion twice referred with approval to President Wilson's veto message, and quoted his position that the President's power to appoint an officer of the United

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[143] *See, e.g., Buckley v. Valeo*, 424 U.S. at 138-40; *Humphrey's Executor*, 295 U.S. at 620-21, 628-29, 631-32.

[144] *See supra* p. 23; App. B at 3b-4b.

[145] The majority opinion asserts that a presidential right to remove at will extends to officers performing judicial as well as administrative functions. 272 U.S. at 135.

[146] Substitute Brief for the United States on Reargument 94-101 (Apr. 13, 1925), *Myers*.

States carries with it the sole power of removal.[147] Justices McReynolds and Brandeis, in separate dissents joined by Justice Holmes, interpreted the majority opinion as meaning that the removal provision in the 1921 Act was unconstitutional.[148]

Nine years later, *Humphrey's Executor* limited the *Myers* ruling to "purely executive officers."[149] But *Humphrey's Executor* upheld a statute granting the President the sole right to remove Federal Trade Commissioners for cause, not a statute (as in *Myers*) reserving a role for Congress in the removal process. Since *Myers*, this Court has never had occasion to rule whether Congress may constitutionally play a role (other than impeachment) in the removal of an officer of the United States. In *Buckley v. Valeo*, involving the delegation of administrative functions to an independent Commission, the Court said that "the President may not insist that such functions be delegated to an appointee of his removable *at will*,"[150] perhaps implying that the President may insist on the sole constitutional right to dismiss such an appointee *for cause*.

If the Court should now decide that this is the case, the 1921 removal provision would have to be held invalid on its face and severable under this Court's precedents on severability. In that event, it would have no bearing on the constitutionality of the 1985 Act.

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[147] 272 U.S. at 169, 172.

[148] *Id.* at 181-82 (McReynolds, J.); *see id.* at 263-64 (Brandeis, J.).

[149] 295 U.S. at 627-28.

[150] 424 U.S. at 141 (emphasis added) (citing *Humphrey's Executor*).

CONCLUSION

The decision of the district court should be reversed insofar as it held unconstitutional that portion of the 1985 Act delegating functions to the Comptroller General.

Respectfully submitted,

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